

August 8, 2003

Ms. Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Draft Nationwide Programmatic Agreement Regarding the Section 106 National
Historic Preservation Act Review Process
WT Docket No. 03-128; FCC 03-125

Dear Ms. Dortch:

On behalf of the National Trust for Historic Preservation, we appreciate the opportunity to comment on the proposed draft of the Nationwide Programmatic Agreement (PA). As you know, the National Trust has been involved in the continuing negotiations and development of the PA through the Telecommunications Working Group and Drafting Committee since its inception. We have made many comments during the course of negotiations and are generally pleased with the progress of the PA. In addition, we offer the following specific comments.

III. Undertakings Excluded From Section 106 Review

In general, we propose narrowing the scope of the exclusions.

1. Modification of Towers: We strongly prefer that this exclusion be limited to towers that have previously been reviewed in compliance with Section 106. This is an especially important safeguard for archaeological resources, since the definition of “substantial increase in the size of the tower” in the Nationwide PA for Collocation (I.C.(4)) allows excavation anywhere within the boundaries of the leased or owned property surrounding the tower. If the original tower was constructed in violation of Section 106, archeological resources within that area would not have been surveyed and would be vulnerable to destruction under this exclusion. Limiting its application to towers with prior Section 106 review would be an important safeguard to protect against that unintended harm.

2. Replacement Towers: This exclusion should also be limited to towers that have previously been reviewed in compliance with Section 106.

3. Special Temporary Authorizations and Experimental Authorizations: The Trust has continually voiced a preference for the two-year time limit for Commission grants of Special Temporary Authority (STA), and we are inclined to support a similar time limit for experimental authorizations. Experimental authorizations should not be allowed to continue indefinitely without some analysis of the potential damage to historical resources. In addition, this exclusion

needs to be modified to address the issue of archaeological resources. While the visual intrusion of a temporary structure will be abated when the structure is removed, any damage to archaeological resources is irreparable. The “no excavation” condition in paragraph 3.d. should be added to all of the categories in this exclusion in order to ensure that archaeological resources are protected.

4. Industrial and Commercial Areas: Although the Trust supports the concept of an exclusion that would encourage the location of towers in existing industrial areas, the “dimensions” used in the proposed exclusion need to be revised.

First, we believe the exclusion should be limited to facilities that are no taller than 200 feet. The exemptions are designed to represent situations where adverse effects are highly unlikely, and we are concerned that towers over 200 feet are inherently more likely to have adverse effects.¹ The construction of such tall towers can significantly diminish the feel and integrity of a historic district or traditional cultural property. Often the viewshed from a historic place can be an important component of its significance, and the presence of such a tall tower could be intrusive and harmful to the site’s historic value.

Second, the size of the “industrial” or “commercial” area that would trigger the exclusion is far too small – just 10,000 square feet. By comparison, the average Wal-Mart store is about 100,000-200,000 square feet. Allowing such a tiny site to be considered an exempt “industrial” or “commercial” area would create an enormous loophole, and would completely subvert the intent of this exclusion.

Third, the limitation that no structure 45 years or older can be located within 200 feet of the proposed facility is inadequate. The presumed Area of Potential Effects for assessing the visual effects of the facility would be ½ mile (2,640 feet), or ¾ mile for towers between 200-400 feet. By that standard, a buffer of 200 feet would be completely inadequate.

5. Right-of-Way Corridors: The Trust supports the concept of an exclusion to encourage the location of towers in existing right-of-way corridors. However, this exclusion as drafted lacks adequate safeguards.

First, we believe this exclusion should be limited to facilities that are no taller than 200 feet, for the reasons discussed above in connection with industrial and commercial areas.

Second, while the philosophy of this exclusion is to focus on existing rights-of-way, the language allows construction of facilities up to 200 feet *outside* those existing corridors. We have grave concerns regarding the potential adverse effects that may occur by extending the exemption to 200 feet outside the outer boundary of a utility corridor or existing Interstate Highway. It is often the case that utility corridors and highways have been carefully aligned to

¹ As cellular technology evolves, the industry is moving towards the use of lower towers. As a result, this change in the scope of the exclusion should not be a hardship on the industry.

avoid historic or archaeological resources. Accordingly, the construction of new facilities just outside the existing right-of-way may in many cases have a *greater* than usual likelihood of affecting historic properties. Allowing an exemption for facilities in those locations would be contrary to the purpose of the exclusions – to identify undertakings that have a minimal likelihood of adverse effects. Allowing the construction of facilities outside existing rights-of-way could also have the effect of substantially exacerbating existing scars on the landscape. In some cases, the size of the facility, when added to the 200-foot buffer zone and a 200-foot right-of-way, could have the effect of tripling the width of the visual intrusion. In order to safeguard against these potential adverse effects, the proposed distance of 200 feet from the outer boundary of the right-of-way needs to be substantially reduced, to perhaps 0-25 feet.

Third, the section of this exclusion outlining undertakings that are *not* excluded from Section 106 review is too narrow. It fails to address archeological sites or traditional cultural properties. In addition, the safeguard for corridors “included” in the National Register should be expanded to apply to National Register-eligible resources as well.

The National Trust has also voiced support of the NCSHPO draft language inserting into Section III.A.5 an “opt-out” provision for railway corridors in active use for passenger trains. It is important to recognize that some passenger railway corridors have extraordinary scenic value and historic settings. As such, each state should have the flexibility to determine whether this exclusion will have a severe negative impact on corridors within their state and, thus, should have the ability to “opt out” of it.

IV. Participation of Indian Tribes and Native Hawaiian Organizations in Undertakings Off Tribal Lands; Tribal Consultation

It has been a stated goal of the Commission to draft the PA in a manner consistent with the agency’s government-to-government relationship with Indian Tribes. The National Trust believes that Alternative A is a workable approach to ensuring that this relationship is respected. There may be many instances in which tribes would prefer to consult directly with Applicants, for a variety of reasons. Alternative A leaves the choice directly in the hands of the tribes in all cases, and allows the tribes to invoke the direct participation of the Commission at any time.

Alternative B, on the other hand, would require the tribes to review and issue letters of certification on an undertaking-by-undertaking basis – no matter how minor the undertaking. We are concerned that such a requirement would create an enormous burden of paperwork on the tribes, who are already short on resources, and could result in substantial delays for minor undertakings.²

Alternative A also has the advantage of including much more extensive guidance for Applicants regarding consultation with Indian Tribes and NHO’s, addressing issues such as

² Paragraph C of Alternative B is also somewhat confusing, and may be subject to misunderstanding by Applicants.

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communication with tribes and confidentiality. This guidance is extremely valuable, and we feel strongly that it should be retained.

We also support the flexibility of the time-frames included in Paragraph IV.F. PCIA has voiced a concern that this provision may be difficult to apply because the deadlines are somewhat indefinite. A-12 (n.7). The National Trust disagrees; we believe that the flexibility in Paragraph F is important due to the limited resources of the tribes.

Paragraph IV.D is critical to this section of the PA in attempting to provide guidance for applicants on how to determine *which* tribes need to be consulted regarding undertakings that are located off tribal lands. Unfortunately, the element missing from Paragraph D is the FCC itself. In our view, the FCC should be taking a much more active role in developing specific information and databases that will assist Applicants in identifying which tribes need to be consulted for undertakings in any given location.

VI. Identification, Evaluation, and Assessment of Effects.

When defining the area of potential effects for visual effects (Section VI.B.2.), the National Trust continues to advocate for a height limitation for the presumed APE, and we concur with the NCSHPO caveat that the APE for facilities over a certain height should be examined on a case-by-case basis. However, we would recommend that the height limit for the presumed APEs should be lowered to 600 feet. It is important that these tall towers not be treated the same as their shorter counterparts for purposes of defining an APE. Towers that are taller than 600 feet could well have adverse visual effects beyond the 1½-mile presumed APE called for under IV.B.2.a.(3).

Thank you for the opportunity to comment on the Proposed Programmatic Agreement. We look forward to continuing our work with the FCC as the agency seeks to improve its compliance with the National Historic Preservation Act.

Sincerely,

Elizabeth S. Merritt
Deputy General Counsel